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No. 87-1949

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

NATHAN VACANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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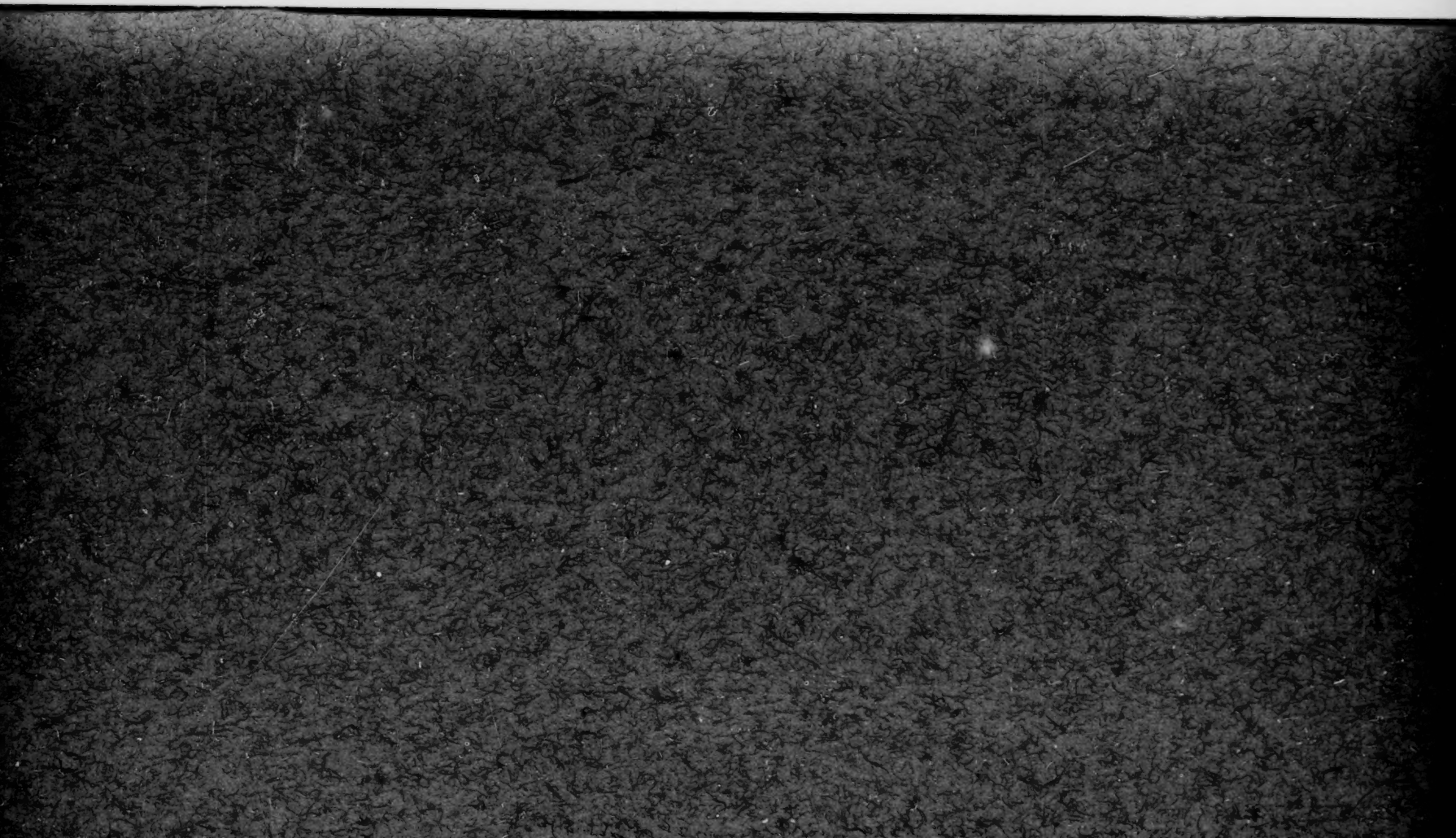

QUESTIONS PRESENTED

1. Whether, by sending petitioner a newsletter containing advertisements pertaining to sexually explicit materials, the government engaged in outrageous conduct that violated petitioner's right to due process.

2. Whether petitioner was entrapped as a matter of law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1988. The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of transporting material depicting a minor engaged in sexually explicit conduct, in violation

of 18 U.S.C. 2252(a)(1). He was sentenced to five years' imprisonment, all but 30 days of which was suspended in favor of probation. The court of appeals affirmed.

1. In 1983 or early 1984, the Postal Inspection Service was informed by the Danish government that petitioner had ordered films involving child pornography from a Danish organization, "Les Young Club" (1 Tr. 14-17; GXs 1-3). In 1985, the Postal Service published a newsletter entitled "Love Land," which contained advertisements aimed at individuals interested in child pornography. In light of petitioner's correspondence with "Les Young Club," the Service sent a copy of "Love Land" to petitioner along with an application blank. In July 1985, petitioner responded to "Love Land's" invitation to become a member by sending in a four dollar membership fee. That fee entitled him to the quarterly "Love Land" newsletter, and it gave him a membership number that he could use in his correspondence with the individuals or companies that advertised in the newsletter. Petitioner voluntarily sent an additional four dollars to "Love Land," which he explained was "for the good job you are doing." 1 Tr. 20-28; GXs 4-6.

In January 1986, the postal service accepted petitioner's application and sent him a number. In May 1986, petitioner responded to five advertisements in "Love Land," using his assigned number. Two of the advertisements had been written by postal inspectors; one of those two advertisements sought films of "young girls 7-16 fully, partially clothed, nude, revealing action." 1 Tr. 29; GX 5. Petitioner's responses to the two advertisements were virtually identical. They stated (GX 7-8):

> Hi there,
>
> Saw your ad, and have some of the items you will be interested in. Most of my magazines, and films are on

> V.H.S. I have a process that I discovered and all my pictures, magazines etc.—I've transferred to video. The idea of having a small picture and looking at it on a big TV screen is great, also being able to zoom in on special parts of the picture. Black & white or color, they all look great. I will not sell any copies, as I am not in that business. But, I will share them with you as long as you share your collection with me. Also I can put your pictures and films and magazines on video for you. All you have to do is supply the video tape. A lot of guys have done that, and we all get the best of all the collections. If you are interested let me know,
>
> Looking to hear from you.
>
> Number 000207.

Postal inspectors drafted fictitious replies to two of petitioner's letters (GXs 9-10). The purported author of one of the replies expressed an interest in sharing pornographic materials with petitioner. And both authors provided petitioner with a blank VHS tape on which he could copy samples of his pornography collection. On June 27, 1986, the postal service received two packages from petitioner. The packages contained identical videotapes depicting child pornography (GXs 11-12). Accompanying the tapes were letters explaining the "time-consuming" process that petitioner had used to make the tapes. Petitioner instructed the persons with whom he was corresponding to use U.P.S. to send the pornographic materials. Petitioner explained that he does "not trust the mails," and that he used a private carrier for deliveries and a mailing service to collect his mail.* Petitioner enclosed his name and address and advised the other party to "disregard" the address on the envelope "for obvious reasons." *Ibid.*

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* Petitioner lived in California but used a mailing service in Seattle, Washington. 2 Tr. 93-94.

2. At the close of the government's case, petitioner moved for a judgment of acquittal on the grounds that he was entrapped as a matter of law and that the government's involvement in the commission of the crime constituted outrageous government misconduct. The district court denied the motion. 2 Tr. 84-85, 87.

Petitioner then testified in his own behalf. He stated that he had begun his pornography collection in 1973, and he acknowledged that he had ordered child pornography from Denmark in 1982. He explained that he had sent "Love Land" four dollars more than the required membership fee because "Love Land" was the "first club that I have ever seen that would be so intent on sending out regularly these brochures." 2 Tr. 96-98, 103. He admitted that he had answered five advertisements in "Love Land." He claimed that the newsletters from "Love Land" rekindled his interest in putting his pornography collection back together after he had lost interest in the collection for almost two years. 2 Tr. 104, 108-109. The jury convicted petitioner on both counts.

3. The court of appeals affirmed in an unpublished opinion (Pet. App. 12-16). The court rejected petitioner's argument that the government engaged in outrageous conduct by sending him the "Love Land" newsletters. The court stated that the government's involvement did not shock its "sense of justice," and it noted that the newsletter itself did not involve any criminal activity prohibited by 18 U.S.C. 2252. Moreover, the court held that the inspector's conduct in drafting ads and writing letters requesting or offering child pornography was a legitimate means of infiltrating the ranks of child pornographers. Finally, the court concluded that although the postal inspector invited petitioner to mail the objectionable material, "he did not coerce [petitioner] to do so." Pet. App. 14.

The court further held that petitioner was not entrapped as a matter of law. Petitioner's order of child pornography from a Danish distributor indicated his predisposition to receive child pornography through the mail. Pet. App. 15. Also, petitioner's use of a false return address and his insistence that further dealings with other traders in child pornography be conducted through a private carrier rather than through the mails indicated that the government did no more than provide petitioner with an opportunity to commit a crime that he was already fully predisposed to commit. *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 6-7) that by sending him issues of "Love Land," the government interfered with his right to collect child pornography in the privacy of his home, a right, he maintains, that is recognized in this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Petitioner argues that in so doing the government was involved in his crime to an "outrageous degree." There is no merit to this claim.

In *Stanley*, this Court held that the mere possession of obscene material in the privacy of one's home cannot constitutionally be made a crime (394 U.S. at 568). Whether or not *Stanley* applies to child pornography (see *New York* v. *Ferber*, 458 U.S. 747 (1982) (recognizing that the prevention of sexual exploitation and abuse of children warrants treating child pornography differently than obscene, adult-oriented material)), it is well settled that *Stanley* does not give one the right to import, distribute, sell, or transport such material. See *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125-129 (1973); *United States* v. *Orito*, 413 U.S. 139, 141-144 (1973); *United States* v. *Reidel*, 402 U.S. 351, 355-356 (1971); see

United States v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion). Moreover, there is nothing "shocking" or "outrageous" about sending a newsletter like "Love Land" to an individual who is known to have ordered child pornography through the mail. Petitioner had already evidenced his willingness to engage in activities that are not protected by *Stanley*. The government did not offend petitioner's right to due process simply by conducting an undercover investigation of his activities. *United States* v. *Russell*, 411 U.S. 423, 430-432 (1973); *United States* v. *Thoma*, 726 F.2d 1191, 1198-1199 (7th Cir.), cert. denied, 467 U.S. 1228 (1984).

2. Petitioner's claim that he was entrapped as a matter of law is frivolous. The record is replete with evidence of petitioner's predisposition to commit the charged offenses. See *Mathews* v. *United States*, No. 86-6109 (Feb. 24, 1988), slip op. 4 (lack of predisposition is an essential element of an entrapment defense). Petitioner had previously used the mails to order child pornography from Denmark. He had been collecting child pornography for more than a decade. Moreover, contrary to petitioner's claim, there was evidence that petitioner's willingness to trade in child pornography was not simply a response provoked entirely by the postal inspector's invitation. In his replies to the postal inspector's letters, petitioner explained that he had devised a modus operandi for avoiding detection – he used a delivery service rather than the mails, and he used an out-of-state mailing service to collect his mail. And in his letters to the postal inspector, petitioner stated (GX 8):

> I will share [my collection] with you as long as you will share your collection with me. Also I can put your pics and books on video for you. All you have to do is supply the video tape. *A lot of the guys have done that and we all get the best of all the collections.*

On the basis of this evidence, the jury was clearly entitled to conclude that petitioner was predisposed to commit the offense of distributing materials depicting children engaged in sexually explicit conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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